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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 297

ROBERT NIX,

vs.

Petitioner,

STATE OF LOUISIANA

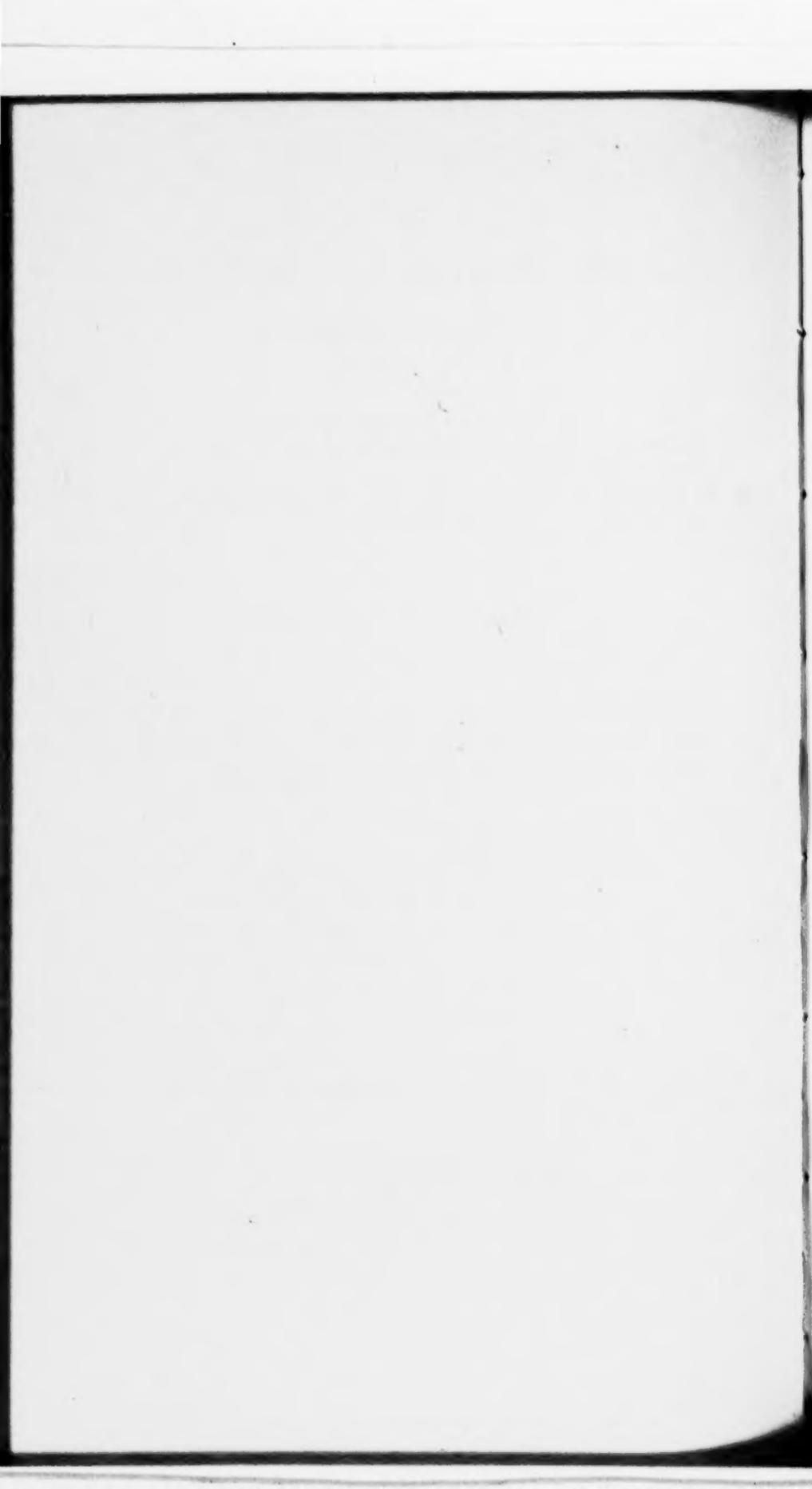
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA,
AND BRIEF IN SUPPORT THEREOF.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA,
AND BRIEF IN SUPPORT THEREOF.**

*To the Honorable Fred M. Vinson, Chief Justice of the
United States and the Associate Justices of the Supreme
Court of the United States:*

Robert Nix, defendant, praying for a writ of certiorari,
respectfully shows:

SECTION I

1

That, by an indictment returned into the Tenth Judicial
District Court of Louisiana, Parish of Red River, October
7, 1946, he was charged with the crime of Negligent Homi-

cide in that (by the operation of an automobile) he did "negligently kill one Mrs. D. A. Gibbs."

That, under said indictment, he was tried and convicted on October 21, 1946, and on November 8, 1946, he was sentenced to serve one year in the Louisiana penitentiary at hard labor.

That said indictment was founded on Art. 32 of the Louisiana Criminal Code (Act 43 of the Louisiana Legislature of 1942). This Article is as follows:

"Negligent Homicide is the killing of a human being by criminal negligence.

"The violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence.

"Whoever commits the crime of negligent homicide shall be imprisoned with or without hard labor, for not more than five years."

That, before trial, in the trial court (The Tenth Judicial District Court of Louisiana, Parish of Red River), he filed and urged the following motion to quash the indictment found against him.

"Now comes Robert Nix, defendant herein, and, prior to pleading to the indictment found against him, respectfully moves to quash the said indictment for the reason that Article 32 of the Louisiana Criminal Code, Act 43 of 1942, the Article under which said indictment was found, is unconstitutional in that by its provisions it violates the due process of law clause of Article 1, paragraph 2, of the Louisiana Constitution, and the due process of law clause of the Fourteenth Amendment of the Constitution of the United States,

particularly in that it provides that the violation of any statute or ordinance shall be presumptive evidence of criminal negligence."

The trial judge overruled petitioner's motion to quash, and petitioner timely reserved his Bill of Exception No. 1. The trial judge's reasons for overruling this motion are found in this Bill of Exception, and were the following:

"I conclude that the sentence 'The violation of a statute or ordinance shall be considered only as presumptive evidence of such homicide,' is not a rebuttable presumption, but an absolute presumption, and therefore violates the pertinent due process clause section of both the State and Federal Constitutions, and is, therefore, unconstitutional, but, as the quoted sentence can be deleted from Art. 32 of the Criminal Code without destroying the denunciation of the crime of Negligent Homicide and penalty clause thereof, I conclude that, under the saving clause of the Code, Sec. 5, page 171, the remainder of the section is a constitutional enactment, and, for that reason, I overruled the motion to quash."

That, after conviction in, and sentence by, the trial court, your petitioner was granted an appeal to the Supreme Court of the State of Louisiana. In this appeal, petitioner relied principally on the described Bill of Exception No. 1.

That on Monday, April 21, 1947, the Supreme Court of the State of Louisiana rendered its decision, which denied petitioner's Bill of Exception No. 1, and affirmed your petitioner's conviction and sentence. The decision of the Court was unanimous, but Chief Justice O'Neill and Justice Fournet, apparently in disagreement with the other

Justices on the reasons assigned for denying Bill of Exception No. 1, only concurred in the decree. The Chief Justice assigned written reasons which were in agreement with the trial judge; namely, that the second paragraph of Art. 32 (the presumption clause) could be deleted without voiding the entire Article.

That, in its opinion, the Supreme Court of the State of Louisiana declared: “* * * We concede that proof of the violation of statutes or ordinances such as those given as illustrations (i.e., running an automobile without a tail-light in a head-on collision), if admitted, would create a presumption of criminal negligence under Article 32. We do not, however, concede that the presumption is conclusive or unrebuttable.”

The Court continued by stating that, even tho the presumption of criminal negligence was brought into being by proof of the violation of a regulatory statute, the burden rested with the State to prove, beyond a reasonable doubt, that the presumed criminal negligence was the cause of the homicide. It further was of the opinion that no competent trial judge would admit proof of the violation of statute or ordinance “that was in no way connected with the facts causing death.” And that, if introduced into the evidence, such proof “might constitute reversible error.”

Petitioner further shows that he appealed to the Supreme Court of Louisiana for a rehearing, and that application was denied. Petitioner then secured from that Court a stay of its mandate until he could file this application under Section 237 of the U. S. Judicial Code, as amended, Vol. 8 FCA, title 28, 344.

SECTION II

Reasons Relied On for the Allowance of the Writ

Petitioner now avers that the cited Article of the Louisiana Criminal Code violates the due process of law clause of the U. S. Constitution, and is unconstitutional, because:

1. It contains an absolute presumption of guilt which has the effect of shifting the burden of proof to the defendant thereby requiring him to prove his innocence.
2. That, as the presumption clause of the Article is unconstitutional, the entire Article must be decreed to be unconstitutional because: (a) It is a penal statute and under the rule requiring strict construction of penal statutes where one paragraph is held to be unconstitutional the entire statute must fall; and (b) The Louisiana Legislature, by the inclusion of the presumption clause in this Article, sought to prevent the use by State in a prosecution for negligent homicide of the Louisiana rule that the violation of a regulatory law of the road is *per se* criminal negligence, and, for that reason, the Louisiana Legislature would not adopt a negligent homicide statute without including that safeguard.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Louisiana, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Louisiana Supreme Court had in the cause numbered and entitled on its docket No. 38,487, State of Louisiana, Appellee, versus Robert Nix, Defendant and Appellant, to the end that this cause may be reviewed by this Court, as provided for by the Statutes of the United States; and that the judgment herein of said Supreme Court of Louisiana be reversed

by this Court, and defendant ordered discharged, and for such further relief as to this Court may seem proper.

August 5, 1947.

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SUPREME COURT OF THE UNITED STATES

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STATE OF LOUISIANA

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I

Opinion of the Court Below

The opinion of the Supreme Court of the State of Louisiana is reported in — La. page —, —, So. (2d) page —, and is in the record (R. 9).

II

Jurisdiction

1. The date of the judgment and decree to be reviewed is April 21, 1947.
2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 of the U. S. Judicial Code, Vol. 8 FCA, title 28, 344.

3. That, in this case, a criminal case, the question drawn was the validity of a criminal statute of the State of Louisiana (Art. 32 of the Louisiana Criminal Code) on the ground that it was repugnant to the due process of law clause of the U. S. Constitution (the 5th and 14th Amendments), and the decision of the Supreme Court of Louisiana was in favor of its validity.

III

Statement of the Case

This has been stated in the preceding petition under Section I, and is reaffirmed and made a part of this brief.

IV

Specification of Errors

1. The Supreme Court of the State of Louisiana erred in holding that the presumption of criminal negligence created by Art. 32 of the Louisiana Criminal Code was a rebuttal presumption which did not shift the burden of proof to the defendant.

2. It likewise was in error for the Chief Justice of the Louisiana Supreme Court (and the trial judge) to hold that, if the presumption clause paragraph of the cited Article was held to be unconstitutional, the offending paragraph of the Article could be deleted, leaving the remaining two paragraphs of the Article a valid, constitutional enactment.

ARGUMENT

Point A. The first specification of error.

Point B. The second specification of error.

POINT A

Criminal Negligence as defined by the Louisiana Criminal Code, Art. 12, is the following:

“Criminal Negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender’s conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.”

Therefore, it is obvious that when one is presumed guilty of criminal negligence one is not presumed to be guilty of a single ultimate fact, but of an involved legal conclusion which, ordinarily, is drawn from a series of ultimate facts. It is axiomatic, therefore, that one may rebut a presumption of a single ultimate fact and when once explained away that presumption disappears entirely from the case and the burden of proof remains constant; but when one is presumed guilty of an involved legal conclusion, such as criminal negligence, the burden of proof is shifted to the one against whom the presumption is drawn, and the presumption prevails unless the opposing testimony on the whole case is found by the court or jury to preponderate.

There are two celebrated United States Supreme Court cases which deal with these two types of presumptions. First, the case of *Mobile J. & K. C. Ry. Co. vs. Turnip Seed*, 219 U. S. 35, 55 Law Ed. 75, which we will refer to as the Mississippi case, and, second, that of *Western and A. R. R. Co. vs. Henderson*, 279 U. S. 639, 73 Law Ed. 884, known as the Georgia case.

Each of the cited cases involved railroad accidents and presumptions in legislative acts.

The Mississippi Statute contained the rebuttable or explanatory presumption. This presumption was that on proof of injury by a locomotive it was presumed that there had been a lack of due care on the part of the operator of the train. This presumption related to a single fact and when once the defendant railroad, by the testimony of its employees, produced evidence that its employees had exercised due care, the inference of lack of care passed from the case, and the burden of proof remained with the plaintiff to show by a preponderance of the evidence that the proximate cause of the accident was the negligence of the defendant railroad.

In the Georgia case, the reprehensible presumption in the statute was that, from the mere fact of a collision between an automobile and a train, it was presumed that the railroad was negligent. It is clear that this presumption went to the ultimate, and had the effect of evidence to be weighed against opposing testimony and prevailed unless such opposing testimony was found by the jury to preponderate.

In 134 Federal Rep. 2d Series, 853, in the case of the *Commissioner of Internal Revenue vs. B. Peanut Company*, on petition for rehearing, Judge Holmes discussed the cited Mississippi and Georgia cases. We quote the Judge:

"If we compare the Turnipseed case with *Western & A. R. R. Co. vs. Henderson*, 279 U. S. 639, 49 Supreme Court 445, we shall observe the difference between a statute that merely supplies an inference of fact in the absence of evidence contradicting such inference and a statute that creates an inference that is given the effect of evidence to be weighed against opposing testimony. The latter presumption is unreasonable and, between private parties violates the due process clause of the Fourteenth Amendment * * *.

"We think it is inaccurate to say that a disputable presumption has the effect of shifting the burden of proof. The law as to the burden of proof is a matter of substance and the substantive law of the case does not change as the trial proceeds. A rule of evidence may supply an inference in behalf of the party upon whom the burden of proof rests, but if that inference is rebutted it disappears entirely from the case and the law governing the burden of proof remains constant.

"* * * The Mississippi Statute (cited *supra*) created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. That of Georgia creates an inference that is given the effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.

"6. The presumption raised by Section 2780 is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment."

Judge Holmes in this opinion further said:

"Legislation declaring that proof of one fact or group of facts shall constitute *prima faciae* evidence of an ultimate fact at issue is valid if there is a rational connection between what is proved and what is inferred. A *prima faciae* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on a particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of facts in the judicial determination of issues involving life, liberty or property."

Therefore, if the presumption of negligence in the Georgia case, a civil case, was reprehensible, surely the presumption here, in a criminal case, of criminal negligence is *a fortiori* reprehensible and unconstitutional.

It is obvious then that, under the cited Louisiana Codal Article, as criminal negligence, plus death for that negligence, equals Negligent Homicide, a defendant, presumed to be guilty of criminal negligence, must assume the burden of proof of the whole case to free himself of the charge. If he fails, his conviction results from legislative fiat, and not, in the time-honored way, from factual proof by the State of guilt beyond a reasonable doubt. Such a condition is truly in violation of the due process clause of the Federal Constitution.

POINT B

First, it is axiomatic that penal statutes are construed strictly in favor of the accused. This strict construction is carried into an investigation of their constitutionality. We quote from American Jurisprudence Vol. 11, page 860, par. 166:

“Although the courts may eliminate parts of an act as unconstitutional and sustain and give effect to the remaining portions, it is sometimes difficult to apply this process to penal statutes because they are always construed strictly. Hence, the courts incline towards treating a penal statute as void in its entirety whenever one section or clause is clearly unconstitutional.”

Second, if we apply the more liberal test to Art. 32 of the Louisiana Criminal Code—the test to determine whether or not the presumption clause and the remaining parts of the Article are so related that it is not to be presumed that the legislature would have passed one without the other—we find the following to be the facts:

In the celebrated Louisiana Supreme Court case of *State vs. Wilbanks*, 168 La. 861, 123 So. 600, decided June 17, 1929, it was declared that the violation of a safety statute was criminal negligence. This decision had the effect in Louisiana of bringing into the criminal law the rule in

civil cases that, in an automobile case, the violation of a regulatory law of the road was negligence *per se*.

In the following year (1930) the Louisiana Legislature adopted the Involuntary Homicide Statute, Act No. 64 of 1930, Louisiana Code of Criminal procedure (Dart) page 427, Sections 1047-1052 inclusive. This statute, in Sec. 4, was insulated against the rule established by the *Wilbanks* case by the following enactment:

“In all prosecutions under this act or under the manslaughter law, as it now exists, whether or not the defendant is guilty of gross negligence or gross recklessness shall be a question of fact for the jury and shall not depend upon the rate of speed fixed by law for operating such vehicle.”

In 1942, the Louisiana Legislature adopted its Criminal Code, which had the effect of repealing the cited Involuntary Homicide Statute. Admittedly, as shown by the notes of the framers of the Code as printed in the Code, the reprehensible presumption clause was inserted in Art. 32 to protect an accused against the rule established in the cited *Wilbanks* case.

Hence, the Louisiana Legislature, in two successive enactments, has shown its opposition to the rule established in the *Wilbanks* case and, by these enactments, has emphatically declared that it would not adopt a negligent Homicide Statute without incorporating therein protection for the accused against the operation of the *Wilbanks* rule. Therefore, it is very evident that the Louisiana Legislature would not re-adopt Art. 32 of the Criminal Code by simply re-enacting the sections thereof which would be left after the deletion of the presumption paragraph.

This rule of law is well-founded in Louisiana. In *State vs. Baynard*, 15 So. (2d), 649, 656, a Louisiana Court of Appeal said:

In recent years the Legislature itself had provided in several statutes that if any part shall be held or construed to be unconstitutional that shall not affect or impair the constitutionality of other provisions, which are constitutional. We do not think that such a requirement is necessary in the act itself for it follows as a matter of constitutional interpretation. In the case of *City of Alexandria v. Hall*, 171 La. 595, 131 So. 722, the court stated: 'It is well settled that a statute may be valid in part * * *, and that the invalid part may be disregarded altogether and the other part constitute a valid statute, if the two parts are not so intimately connected as to raise the presumption that the Legislature would not have enacted the one without the other.'

In the U. S. Supreme Court case of *McFarland vs. American Sugar Company*, 241 U. S. 79, 60 L. Ed. 899, 36 S. C. 498, the Court was concerned with a Louisiana Act—Act No. 10 of the Louisiana Legislature of the Extra Session of 1915. This Act contained two presumptions:

First: "Any person engaged in the refining of sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be *prima faciae* presumed to be a party to a monopoly or combination in restraint of trade, and shall be subject to a fine of \$500 a day for the period during which he is adjudged to have done so."

Second. "If shown * * * that any refinery has been closed or kept idle for more than one year, it shall be presumed to have been done for the purpose of violating this Act, or the laws against monopoly, etc."

Naturally, the U. S. Supreme Court held the quoted

presumption clauses of the questioned act unconstitutional. It then quoted from R. C. L. (now American Jurisprudence, Vol. 11, page 860, par. 166) as follows:

"Although the courts may eliminate parts of an act as unconstitutional and sustain and give effect to the remaining portions, it is sometimes difficult to apply this process to penal statutes because they are always construed strictly. Hence, the courts incline towards treating a penal statute as void in its entirety whenever one section or clause is clearly unconstitutional."

And, after that quotation, it declared:

"* * * it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. * * * we agree with the court below that the act must fall as a whole, as it fails in those sections without which there is no reason to suppose that it would have been passed."

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

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